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3 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Sec. 1239, pp. 176-177	14-15
6 Moore's Federal Practice, 2d ed, para. 56.13, p. 2092	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

SERVICE INVESTMENT CO., INC.,
Petitioner,
vs.
STATE MUTUAL LIFE ASSURANCE CO. OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Service Investment Co., Inc., petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on November 18, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is printed in the appendix at page (45a). The opinion of the United States District Court, Eastern District of Michigan, Southern Division, is unreported and is printed in the appendix at page (37a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (appendix, page 45a) was entered on November 18, 1972. Petition for rehearing was denied on December 12, 1972 (appendix, page 46a). The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED

Did the trial court deny petitioner its right to a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution?

STATEMENT OF THE CASE

As used in this Brief:

1. "Service Investment" refers to Service Investment Co., Inc., a Michigan corporation, Plaintiff.
2. "State Mutual" refers to State Mutual Life Assurance Co. of America, a Massachusetts corporation, Defendant.
3. "Detroit and Northern" refers to Detroit and Northern Savings & Loan Association, a Michigan Savings & Loan Association.
4. "Inland Seas" refers to Inland Seas Trading Company, a Limited Michigan Co-partnership, mortgage broker for Service Investment.

5. "Holmes-Harmon" refers to Holmes-Harmon Corporation, a Michigan corporation, and agent of Defendant.

On December 24, 1969, Service Investment executed a promissory note in the principal sum of One Million One Hundred Twenty-Five Thousand and 00/100 ($1,125,000.-00) Dollars on which State Mutual was payee. This note was secured by a first real estate mortgage on certain land, nursing home, and buildings situated in the City of Warren, Macomb County, Michigan. (Appendix, p 5a.)

The note provided that Service Investment pay additional sums equal to 2 per cent (2%) of the annual gross income received by it computed according to the provisions of the note. The note also provided:

> The undersigned shall have the privilege of paying the full amount of all indebtedness secured by this note on January 1, 1982, or on any installment payment date thereafter; provided, that notice of intention to exercise said privilege be given in writing at least sixty (60) days prior to the date on which said payment is to be made; and provided further that the undersigned pay to the holder a premium of 5 per cent (5%) of the principle amount so paid if the loan is paid during the thirteenth year of the term of the loan; and a similar premium declining by one-half (½) of one per cent (1%) for each year thereafter.

Homes-Harmon Corporation of Birmingham, Michigan, was the mortgage loan correspondent and agent of State Mutual. In the middle of July, 1970, T. Waldo Thompson, secretary and director of Holmes-Harmon, was given notice by Service Investment that it desired to re-finance the loan with another source if it could repay the loan at par. (Appendix, p 18a.)

On July 28, 1970, Carl D. Valiton, Director of Mortgage Loans for State Mutual, sent a letter to T. W. Thompson of Holmes-Harmon Corporation acknowledging the request to repay at par and stating that State Mutual (Appendix, p 18a)

> ". . . in order to assist . . . will accept payment in full at par. Our agreement to accept pre-payment on this basis shall expire on September 30, 1970, at which time the existing note shall apply."

On August 7, 1970, Mr. Thompson wrote to Alex Seskin, President of Service Investment, enclosing State Mutual's letter, stating the agreement to accept pre-payment in full without penalty, and requesting that Holmes-Harmon be kept "informed as to your progress in re-financing the mortgage" (Appendix, p 17a).

Service Investment then retained the services of Inland Seas Trading Co., mortgage brokers, to locate new financing. A commission agreement was made in which Service Investment became obligated to pay Inland Seas a commission of $30,000.00 upon "presentation of commitments . . ." (appendix, p 27a).

By letter dated October 23, 1970, Holmes-Harmon Corporation advised Service Investment that it recommended to State Mutual that the agreement to accept pre-payment at par be extended to December 31, 1970, stating in that letter, ". . . we trust that during this period you will be able to complete your refinancing of the loan." State Mutual (Carl D. Valiton), in turn, wrote Mr. Thompson of Holmes-Harmon on November 2, 1970, accepting "your recommendations concerning the extension of our agreement to accept pre-payment in full at par until December 31, 1970". This came 33 or more days after September 30, 1970 (appendix, p 21a).

On December 14, 1970, Service Investment, through Mr. Rosenzweig (the Inland Seas Broker) submitted its application to Detroit and Northern Savings and Loan Association of the City of Detroit, for a new loan in the amount of One Million Five Hundred Thousand and 00/100 ($1,500,000.00) Dollars (appendix, p 27a)

Thereafter, Detroit and Northern began processing the new loan. On January 8, 1971, Mr. Hinks, an attorney, of Detroit, Michigan, submitted a legal opinion to Detroit and Northern on the proposed loan, describing the legal requirements. A survey of the premises was obtained, a corporate resolution prepared, a credit report with respect to Service Investment was obtained, an appraisal of the property was made, balance sheets and profit and loss statements of Service Investment were furnished and a closing date for the new mortgage was set (January 29, 1971). The closing, execution of the documents, and disbursal of funds was to be through an escrow arrangement with Burton Abstract.

On or about January 18, Mr. Mintz, the Accountant for Service Investment, was advised that the Detroit and Northern loan would be approved and that Board approval would be taken on January 24, 1971 (Appendix p 15a). He phoned Holmes-Harmon for payoff figures, specifically requesting a per diem rate if the loan did not close on January 29, 1971, because of commitments of his own or of corporate counsel. This was the first communication of State Mutual relative to the agreement to accept prepayment at par after December 31, 1970 (Appendix p 15a).

On January 19, 1971, Mr. Thompson of Holmes-Harmon sent a letter to Mr. Carl D. Valiton, of State Mutual, stating that he had been advised by Mr. Mintz that Detroit and Northern had issued a commitment for One Million Five Hundred Thousand, and that a closing was set for

January 29, 1971 (appendix, p 22a). On January 22, 1971, State Mutual sent a letter to Mr. Thompson, of Holmes-Harmon, confirming a telephone conversation of that date, and concerning his letter of January 19, 1971, stating:

> "we will accept prepayment in full of the above loan, at par, provided payment in full is made by February 1, 1971.
>
> "Since your office has received the January 1, 1971 payment, we have calculated the amount necessary to pay this loan in full on January 29, 1971, as follows:

Principal balance based on your receipt of 1/1/71 payment	$1,087,833.87
Interest at 10 per cent (10%) from 1/1/71 to 1/29/71 (28 days).....	8,461.04
Total	$1,096,294.91

> Per Diem Interest $302.18 from 1/29/71 to actual date in full."

Pursuant to established policy of Detroit and Northern it was contemplated that the Board of Directors of Detroit and Northern would formally approve the loan on Monday, January 24, 1971.

On January 21, 1971 (the Friday before contemplated Board action) the United States Internal Revenue Department served a "Summons" upon John Seibel, of Detroit and Northern Savings, stating that he was summoned to "give testimony" concerning tax liability of Mr. Seskin, the President of Service Investment. The subject of that inquiry was the value of the mortgaged premises and the appraisal obtained for the new mortgage. The Summons from Internal Revenue created concern at Detroit and Northern about the new mortgage. The Board action set for the following Monday did not occur. It was necessary

that Mr. Mintz send a letter to Detroit and Northern (January 26, 1971) advising them that the audit of Internal Revenue was a routine audit of the 1967 and 1968 Tax Returns of Service Investment Company and Alex Seskin (Appendix p. 16a). Mr. Mintz explained that IRS agents desired to examine all pertinent data and in particular the appraisal from Mr. Edward J. McDonnel, secured for the new mortgage. In that letter, Mr. Mintz stated his own opinion that the audit should have no bearing on re-financing or the new loan. Detroit and Northern was satisfied by that explanation and opinion.

On January 25, 1971, Mr. William H. Husted of Holmes-Harmon sent State Mutual's pay off figures to Mr. Mintz showing the balance to pay off the State Mutual loan to be One Million Ninety-six Thousand Two Hundred Ninety-eight and 91/100 ($1,096,294.91) Dollars. The complete text of that letter is in the Appendix. It is brief enough to repeat here for convenience (Appendix p. 23a).

> "This will confirm our telephone conversation today with regard to State Mutual's agreement to accept prepayment in full of the above loan at par provided payment in full is made by February 1, 1971.
>
> The following reflects the amount necessary to pay this loan in full on January 29, 1971:
>
> | | |
> |---|---|
> | Principal Balance based on our receipt of 1/1/71 payment ..... | $1,067,833.87 |
> | Interest at 10% from 1/1/71 to 1/29/71 (28 days)..... | 8,461.04 |
> | Recording discharge of mortgages .. | 4.00 |
> | | $1,096,298.91 |
>
> Per Diem interest $302.18 from 1/29/71 to actual date of payment in full

> There is a balance in the tax escrow account in the amount of $12,070.92 and this will be refunded along with the cancelled mortgage documents." (emphasis supplied.)

On January 26, 1971, a memorandum was signed by officers of Detroit and Northern addressed to Mr. K. D. Seaton, President of Detroit and Northern, recommending approval of the loan application of Service Investment. The memorandum described the proposed mortgage, set out requirements for the loan, and recommended "approval of this loan for One Million Five Hundred Thousand and 00/100 ($1,500,000.00) Dollars."

Defendant asserted that Holmes-Harmon sent a letter to Mr. Mintz on January 28, 1971, with the following language (appendix, p. 36a):

> "We have been notified that the closing has been changed from January 25 to February 5, 1971. In view of this, we must revoke our letter of January 25, 1971, as it was predicated on payment being made in full by February 1, 1971.
>
> We have requested a revised pay-off letter from State Mutual and you will be advised as soon as we hear from them."

The above letter was not read into the record or described when Thompson's deposition was taken although the Holmes-Harmon file had been subpoenaed, it came in later when the Thompson Affidavit was filed.

On February 1, 1971, at its Monday meeting, the Board of Directors of Detroit and Northern met and formally approved the mortgage of Service Investment in the amount of One Million Five Hundred Thousand and 00/100 ($1,500,000.00) Dollars. The approval was communicated to the Detroit office of Detroit and Northern by letter of

February 2, 1971, and a new closing date for the mortgage was set (February 5, 1971).

On February 4, Mrs. Billie Smith, the closing agent for Detroit and Northern, phoned Mr. Husted at Holmes-Harmon to confirm pay off figures for February 5, 1971. She was advised at that time by Mr. Husted that State Mutual wished to see a copy of the commitment letter issued by Detroit and Northern. This was reflected in a handwritten memorandum in the file of Holmes-Harmon which was described in the deposition of Mr. Thompson. This memorandum established that Mr. Husted had called Mr. Carl D. Valiton of State Mutual, and that Mr. Valiton wished to have a copy of the commitment letter.

Mr. Rosenzweig, the broker, then delivered the $15,000.00 non-refundable commitment fee to Detroit and Northern picked up the mortgage commitment letter of Detroit and Northern, and brought it to Holmes-Harmon, all on February 4, 1971 (appendix, p. 28a). On that same date, Mr. Husted, of Holmes-Harmon, mailed the commitment letter of Detroit and Northern to Mr. Valiton of State Mutual. Mr. Rosenzweig was asked to return on February 5, 1971, to pick up the pay off letter (Appendix, p. 29a).

Holmes-Harmon delivered a new pay off letter on February 5, 1971, on behalf of State Mutual, setting forth new terms for repayment of its loan. The letter precipitated this controversy and caused postponement of the closing. The terms were as follows, again for convenience (Appendix, p. 24a):

> "This is to inform you that the State Mutual Life Insurance Company of America, has authorized us to accept payment in full of the above-captioned loan, provided said payment in full is received not later than February 8, 1971, upon the following basis:

Principal balance	$1,087,833.87
Interest at 10 per cent (10%) from 1/1/71 to 2/5/71	$ 10,274.00
2 per cent (2%) of gross income of $260,000.00	5,200.00
Pre-payment premium	54,381.69
Recording discharge of mortgages ..	4.00
Total	$1,157,703.56

If we do not receive payment until February 8, 1971 there will be an additional three (3) days' interest amounting to $906.54.

The signed statement by Service Investment Company certifying rental income received for the period of the loan shall be required.

There is a balance in the tax escrow account in the amount of $12,070.92 and this will be refunded along with the cancelled mortgage documents."

The closing of the new mortgage ultimately occurred on February 8, 1971. Mr. A. Albert Sugar, attorney for Service Investment, requested Burton Abstract and Title Company, the escrow agent, to prepare two (2) separate checks from the proceeds of the new mortgage. One check in the amount of $54,391.69, the other for $1,104,520.00, totaling $1,158,911.69. Mr. Sugar requested that the check for $54,391.69 carry a legend on the back "paid under protest". The escrow agent prepared the checks accordingly, and they were delivered with the requested legend on the back of the one check. The State Mutual note and mortgage were paid and discharged on February 8, 1971, under protest to the extent stated.

On February 8, 1971, Holmes-Harmon delivered yet another letter to Service Investment referring to its letter

of February 5, 1971, and stating: "State Mutual has extended this time limit to not later than February 10, 1971".

Complaint was filed in the Federal District Court for the Eastern District of Michigan, Southern Division, on April 26, 1971, by Service Investment against State Mutual to recover the charge of $54,381.69 it had paid under protest. Jurisdiction was predicated upon diverse citizenship between the parties and the amount claimed. 28 USC Sec. 1332. The Complaint alleged State Mutual's refusal to carry out the agreement to accept prepayment at par, it alleged that the charge was usurious and prayed for judgment, interest, costs, and attorney fees.

Service on the Defendant was accomplished and returned on June 23, 1971. Defendant answered on July 6, 1971 relying on a penalty clause in the underlying promissory note and claiming that no right of prepayment existed until January 1, 1982, and then only upon sixty (60) days notice and payment of penalties on a declining scale up to the end of the mortgage. Defendant denied usury, claimed no cause of action had been stated and put at issue the material allegations of the Complaint.

Plaintiff replied on July 26, 1971 denying that no right to pay at par existed, and alleged by way of reply to the prepayment clause of the note the agreement to accept prepayment, waiver by State Mutual's conduct, detrimental reliance by Service Investment, that time was not the essence of the agreement to accept prepayment at par, that the charge of $54,391.69 was usurious, and that the time payment in the note itself was ambiguous. With its Reply filed on July 26, 1971, Service Investment demanded trial by jury.

The deposition of T. W. Thompson, a secretary and director of Holmes-Harmon Corporation, was taken in Oc-

tober of 1972, and filed on November 3, 1972. Holmes-Harmon Corporation was the local Detroit agent of State Mutual responsible for servicing mortgages, and it handled the correspondence between State Mutual and Service Investment during the pertinent period. The file of Holmes-Harmon was present at the deposition and portions of it were read into the transcript or otherwise copied.

The deposition of Billie Smith, the mortgage closing agent of Detroit and Northern, was taken in November of 1971, and filed on December 3, 1971. The Detroit and Northern file on the new mortgage was subpoenaed at that time and its contents, in part, were read into the deposition or otherwise copied.

Plaintiff filed a Motion for Summary Judgment on December 6, 1971, pursuant to Rule 56 on the basis of usury and alleging that time was not of the essence of the agreement to prepay as a matter of law. This motion was supported by a comprehensive Statement of Facts, by the Affidavit of Jack Rosenzweig (agent of Plaintiff's mortgage broker) by the Affidavit of Bernard Mintz (Plaintiff's Accountant) and by the described depositions. Plaintiff filed with its motion a Brief of Law. Originally set for hearing on December 20, 1971, this motion was argued on January 10, 1972, and January 17, 1972 before Judge Keith.

Defendant filed a Cross Motion for Summary Judgment on December 28, 1972, with the affidavit of T. Waldo Thompson asserting it was entitled to Judgment of dismissal. Defendant also filed a Brief of Law. Its motion was heard with Plaintiff's motion on January 10 and 17, 1972.

On January 21, 1972, Judge Keith entered a Memorandum and Order which denied Plaintiff's Motion, granted

Defendant's Motion, and dismissed the Complaint. Judge Keith in his Memorandum Opinion found the charge of $54,391.69 not to be usurious, and determined that time was of the essence of the agreement to accept prepayment at par. In effect, finding that Plaintiff's right to prepay at par expired on January 31, 1971.

Believing that the Memorandum and Order of January 21, 1972, erroneously had determined fact questions, as well as inferences to be drawn from the facts, Plaintiff filed a motion for rehearing, with supporting brief, on February 9, 1972. This motion was made under Rule IX-A of the Rules for the Eastern District of Michigan. This motion did not require an answer or a hearing under that Rule; it was denied by Order below filed February 17, 1972.

Plaintiff filed claim of appeal to the United States Court of Appeals for the Sixth Circuit on February 18, 1972. The Court of Appeals affirmed the trial court on November 18, 1972. On December 1, 1972 plaintiff petitioned the Court of Appeals for re-hearing. On December 12, 1972 the Court of Appeals denied plaintiff's petition for re-hearing.

REASONS FOR GRANTING THIS WRIT

In the district court, plaintiff, petitioner herein, and defendant, respondent herein, made separate motions for summary judgment, both alleging that there were no genuine issues as to any material fact and that as a matter of law judgment should be entered for the movant. Both motions were based upon Rule 56 of the Federal Rules of Civil Procedure.

The trial court denied plaintiff's motion and granted defendant's motion. The court filed a memorandum with the orders.

Plaintiff asserts that the trial court, in granting defendant's motion for summary judgment, made specific findings of fact and usurped the functions of the jury. Plaintiff had originally made demand for a jury trial and the trial court's resolution of factual issues denied to plaintiff its seventh amendment[1] right to a jury trial.

Clearly the mere fact that cross motions for summary judgment have been filed does not empower the granting of a summary judgment where substantial issues of facts are raised. *Eagle v. Louisiana and Southern Life Insurance Co.* 464 F 2d 607 (CA 10, 1972); *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres Inc.*, 388 F 2d 272 (CA 2 1967); *Cram v. Sun Insurance Office, Ltd.*, 375 F 2d 670 (CA 4 1967); *Nafco Oil & Gas Inc. v. Appleman*, 380 F 2d 323 (CA 10 1967); *United States v. Mills*, 372 F 2d 693 (CA 10 1966); *Union Insurance Society of Canton, Ltd. v. William Gluckin & Co., Inc.*, 353 F 2d 946 (CA 2 1965); *Jacobson v. Maryland Casualty Co.*, 336 F 2d 72 (CA 8 1964) cert. den. 379 US 964, 13 L ed 2d 558, 85 S Ct 655 (1965); *Allied Mutual Insurance Co. v. Lysne*, 324 F 2d 290 (CA 8 1963); *Demandre v. Liberty Mutual Insurance Co.*, 264 F 2d 70 (CA 5 1959); *Volunteer State Life Insurance Co. v. Henson*, 234 F 2d 535 (CA 5 1956); *Hycon Mfg. Co. v. H. Koch & Sons*, 219 F 2d 353 (CA 9 1955); 6 Moore's Federal Practice, 2d ed, para 56.13, p. 2092. The reason for this rule is explained in 3 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Sec. 1239, pp. 176-177:

> "The fact that both parties have moved for summary judgment does not establish that there is no

[1] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

issue of fact. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted.

Thus, both motions should be denied if the court finds that there is actually a genuine issue as to a material fact. If both parties move for a summary judgment, each concedes and affirms that there is no issue of fact only for the purposes of his own motion . . ."

Nafco Oil & Gas, Inc. v. Appleman, 380 F 2d 323, (CA 10 1967) is a typical case. Here a contract for payment was in dispute. On cross motions for summary judgment the trial court held portions of the contract ambiguous and ascertained the agreement from the parol evidence before the court on the motions. The Court of Appeals held this to be error, since if the contract was ambiguous, then its construction raised questions of material facts for the jury.

It is submitted that the same reasoning applies to the present case. An analysis of the present case as it was presented to the lower court amply demonstrates that the court below erred in making specific findings of facts disputed by the parties.

In paragraph 9 of plaintiff's complaint it is alleged: (emphasis added)

> "Plaintiff and Defendant did reach an agreement *to accept prepayment of the loan at par.*"

In other words, it was plaintiff's position below that plaintiff and defendant had agreed to an arrangement whereby plaintiff could repay the mortgage held by the defendant at par value and without penalty. This is fur-

ther amplified by plaintiff's reply to the answer, where plaintiff maintained that this was a continuing agreement that it waived the language of the original contract, and that time was not of the essence in this agreement.

Defendant's motion for summary judgment was based upon the factual assertion that the extension of the prepayment at par proposal rendered January 22, 1971, was a "final extension" which ran out on February 1, 1971. Thus defendant maintained that it could place whatever charge it liked upon any subsequent agreement to allow prepayment, whereas plaintiff maintained that the charge of $54,391.69, actually added to this agreement five days later, was an unjust and usurious amount in violation of their mutual understanding.

It should have been clear to the trial court upon review of these motions and their supporting affidavits and exhibits that material fact questions were disputed by the parties. Some of the controverted facts are the following:

A. Was time of essence to the parties?

Obviously the parties each take a different view as to the need to comply with the February 1, 1971 cut off date. Defendant maintains that the agreement to allow prepayment at par without charge terminated on this date, whereas plaintiff, who had seen such other "final dates" extended without penalty throughout the previous correspondence between the parties, deemed such date to be "not of the essence", especially in lieu of the pendency of the final closing of the complicated transactions involved. Thus the surprise to plaintiff upon discovering a charge of $54,391.69 added to this agreement to prepay only five days later.

The facts of this case, as they have been outlined in the statement of the case, generate factual questions as to the intent of the parties with regard to time being of the essence. Many of the delays encountered were brought about through no fault of the plaintiff. (The delay caused by the IRS audit is an example). Defendant was throughout informed of plaintiff's attempts to obtain refinancing and continually expressed its willingness, from one month to the next, to accept prepayment at par—without any additional charge. Then, quite suddenly, when such refinancing became an immediate reality, defendant insisted upon an inflexible February 1 date and charged plaintiff $54,391.69 for the five days beyond February 1 required to close the deal.

Generally the mere mentioning of a date for payment does not make time of the essence. See, *Guardian Detroit Bank v. Peckham,* 261 Mich. 52, 245 NW 567 (1932). Whether or not time is of essence depends upon the circumstances and intent of the parties. *Waller v. Lieberman,* 214 Mich. 428, 183 NW 235 (1921). Of course the intention of the parties is a fact question for the jury to determine. *McKenzie v. Sykes,* 47 Mich. 294, 11 NW 164 (1882); *Guilmet v. Campbell,* 385 Mich. 57, 188 NW 2d 601 (1971).

B. If time was of the essence was this condition waived by defendant?

There is no question that performance at a specified time may be waived by written or oral agreement extending the time. *Waller v. Lieberman,* 214 Mich. 428, 183 NW 235 (1921).

On February 4, 1971, four days after the February 1 deadline, defendant informed plaintiff's broker that it

wanted to see the new commitment letter issued by Detroit and Northern. Such continual interest in the refinancing affairs of plaintiff on the part of defendant could well constitute a waiver of the February 1 deadline. Waiver is also a question for the jury. *Al-Oil Inc. v. Pranger*, 365 Mich. 46, 112 NW 2d 99 (1961); *Bridge and Iron Co. v. City of Alpena*, 238 Mich. 164, 213 NW 93 (1927); *Fort Dearborn Coal Co. v. Cement Co.*, 230 Mich. 360, 202 NW 977 (1925).

C. Was defendant estopped by its conduct subsequent to February 1, 1971 from altering its agreement to accept prepayment at par without penalty or charge?

As noted, defendant on February 4, 1971, after the stated deadline but before submitting its new offer containing the disputed $54,391.69 charge, requested to see the new commitment letter. In order to comply with this request plaintiff had to pay a non refundable commitment fee of $15,000.00 to Detroit and Northern and a brokerage commission of $30,000.00. These expenses, of which defendant probably was aware (another question of fact), would likely not have been incurred by plaintiff at that time had plaintiff not expected defendant to abide by its continually proferred agreement to accept prepayment at par.

Plaintiff has asserted throughout that upon these facts defendant was estopped from requiring the $54,391.69 charge one day later. See 31 CJS "Estoppel Sec. 114, p. 589; *Achenbach v. Mears*, 272 Mich. 74, 261 NW 251 (1935); *Zadigian v. Gard*, 223 Mich. 147, 193 NW 783 (1923). This question of estoppel is also one of fact for the jury. 28 AM Jur 2d, Estoppel and Waiver, Sec. 151, p. 833; 31 CJS, Estoppel, Sec. 163, page 785.

The trial court in this present case resolved all of these factual disputes against the plaintiff and found that time was of the essence (footnote 3 of the memorandum). The case relied upon by the lower Court, *Grade v. Loafman*, 314 Mich. 364, 22 NW 2d 746 (1946) is clearly distinguishable from the present case on several grounds; it was a fully tried case; the language of the agreement was different; no waiver, estoppel, detrimental reliance, nor penalty appears; no supervening event beyond the control of the parties caused delay. But more importantly, this footnote by the lower court resolves a disputed factual issue which should have been left to the jury.

Generally in passing upon a motion for summary judgment the court is to construe the facts and inferences therefrom in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 US 654, 82 S Ct 993, 8 L ed 2d 176 (1962). In the present case the trial court committed further error of construing the facts most favorably for the defendant whose motion for summary judgment was granted. By holding time to be of essence and concluding that the prepayment at par agreement terminated on February 1, 1972 the trial court foreclosed entirely any consideration of plaintiff's evidence of waiver, estoppel, or that time was not of essence.

It is respectfully submitted that genuine issues of material facts were present in this case and that the trial court erred in granting defendant's motion for summary judgment in denying plaintiff the right to have a jury resolve these issues of fact.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted:

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APPELLANT'S APPENDIX

IN THE

District Court of the United States

For the Eastern District of Michigan
Southern Division

Service Investment Company, Inc., a Michigan corporation, *Plaintiff,* vs. State Mutual Life Assurance Company of Michigan, a Foreign corporation, *Defendant.*	No. 36,406

RELEVANT DOCKET ENTRIES

1971

Apr. 26. Complaint filed.
July 6. Answer filed.
July 26. Plaintiff's Reply to Answer filed.
Nov. 3. Deposition of T. Waldo Thompson filed.
Dec. 3. Deposition of Billie Smith filed.
Dec. 6. Motion for Summary Judgment filed.
Dec. 6. Affidavit of Bernard Mintz in Support of Plaintiff's Motion for Summary Judgment filed.
Dec. 6. Affidavit of Jack Rosenzweig filed.
Dec. 28. Defendant's Motion for Summary Judgment filed.
Dec. 28. Affidavit of T. Waldo Thompson filed.

1972

Jan. 21. Memorandum and Order filed.
Feb. 9. Plaintiff's Motion for Rehearing filed.
Feb. 17. Order Denying Motion for Rehearing filed.

COMPLAINT

(Filed April 26, 1971)

Now comes Service Investment Company by and through its attorney A. Albert Sugar of the law firm of Sugar, Schwartz, Silver, Schwartz & Tyler, and states as follows:

1. Plaintiff is a Michigan corporation doing business in the State of Michigan.

2. Defendant is a foreign corporation organized and existing under the laws of the Commonwealth of Massachusetts with its principal place of business at 440 Lincoln Street, Worcester, Massachusetts.

3. This Court has jurisdiction in this action in that there exists Diversity of citizenship betwen the parties hereto and the amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

4. On or about December 24, 1969, Plaintiff, Serivce Investment Company, Inc., entered into a mortgage agreement with Defendant, State Mutual Life Assurance Company of America.

5. By the terms of the mortgage, certain property located in the City of Warren, Michigan, belonging to Plaintiff was mortgaged to Defendant in consideration of One Million, One Hundred Twenty-Five Thousand ($1,125,000.00) Dollars, the balance to mature on December 1, 1984. See Exhibit 1 attached and incorporated as if made a part hereof.

6. Plaintiff subsequently negotiated and received a mortgage commitment of One Million Five Hundred Thousand

($1,500,000.00) Dollars refinancing from a Detroit savings and loan association on the same parcel of property.

7. Plaintiff desired to cancel its mortgage arrangement with Defendant in order to seek the benefits of the larger mortgage commitment.

8. Negotiations between Plaintiff and Defendant transpired to this end.

9. Plaintiff and Defendant did reach an agreement to accept prepayment of the loan at par. See Exhibit 2 attached hereto and incorporated as if made a part hereof.

10. The closing of the subsequent mortgage was adjourned from time to time by the lender to serve its convenience and was finally set for closing on February 5, 1971.

11. The Defendant was duly notified of the closing and on February 5, 1971, the Defendant refused to accept the balance due on its mortgage at par in spite of the arrangements as set forth in Exhibit 2, unless Plaintiff paid to it the sum of Fifty-Four Thousand Three Hundred Ninety-One and 69/100 ($54,391.69) Dollars in excess of the true balance due and owing to the Defendant.

12. When Defendant refused to carry out its arrangements unless it was paid the aforementioned abusive and coercive sum, Plaintiff arranged to close the mortgage on February 8, 1971, and to pay the said sum under protest.

13. On February 8, 1971, the mortgage was closed and the former mortgage balance was repaid to the Defendant together with a separate check in the amount of Fifty-Four Thousand Three Hundred Ninety-One and 69/100 ($54,391.69) Dollars, which latter sum was paid under protest.

14. The action of the Defendant in forcing the Plaintiff to pay to it the excessive sum of Fifty-Four Thousand Three Hundred Ninety-One and 69/100 ($54,391.69) Dollars was a flagrant violation of the laws of the State of Michigan with reference to usury.

15. In addition, Plaintiff has been caused considerable additional expenses and attorney fees by the flagrant acts of the Defendant.

Wherefore, Plaintiff claims judgment against the Defendant for Fifty-Four Thousand Three Hundred Ninety-One and 69/100 ($54,391.69) Dollars, interest from Februaray 8, 1971, expenses incurred by Plaintiff, including reasonable attorney fees and costs.

A. Albert Sugar
Attorney for the Plaintiff
950 Guardian Building
Detroit, Michigan 48226
963-7300
Sugar, Schwartz, Silver, Schwartz
& Tyler
By: /s/ A. Albert Sugar
Attorneys for Plaintiff
950 Guardian Building
Detroit, Michigan 48226

Dated: Detroit, Michigan
April—, 1971

EXHIBIT 1

EXCERPTS FROM MORTGAGE

• • • • •

15. The Mortgagee shall have the option without notice to declare the entire principal and all other indebtedness secured by said Promissory Note and this Mortgage to be immediately due and payable upon default in the payment of any installment according to the terms of said Promissory Note or upon default in the performance of any of the covenants or agreements contained in this Mortgage, and said principal and all other amounts secured by said Note and this Mortgage, although the period limited for payment thereof may not have expired, shall thereupon become due and payable, said principal and other amounts shall bear interest at the rate of Eleven (11%) per cent per annum. The failure to exercise said option upon any default shall not constitute a waiver of the right to exercise the same upon any subsequent default. The exercise of said option shall not be waived and the rights of the Mortgagor reinstated by payment or acceptance of amounts that are delinquent, but such waiver and reinstatement may be effected only by agreement in writing executed by the Mortgagee. The foregoing option shall not expire with the exercise thereof, shall continue in effect notwithstanding any reinstatement or extension and may be exercised from time to time thereafter upon the occurence of subsequent defaults.

• • • • •

17. If default be made in the payment of any installment according to the terms of said Promissory Note, or in the performance of any of the covenants or agreements herein contained, then and in each such case it shall be lawful for the Mortgagee and it is hereby authorized and

empowered to sell or cause to be sold the mortgaged property pursuant to the statute in such case made and provided, and out of the proceeds of such sale to retain the principal and interest and all sums then due in accordance with the terms of said Promissory Note and this Mortgage, and the costs and expenses of such sale, and the attorney fee provided by statute, rendering the surplus, if any, to the Mortgagor.

• • • • •

EXHIBIT A

(Attached to Answer, *infra)*

PROMISSORY NOTE

$1,125,000.00 Birmingham, Michigan
December 24, 1969

FOR VALUE RECEIVED, the undersigned promises to pay to the order of State Mutual Life Assurance Company of America, a corporation organized under the laws of the Commonwealth of Massachusetts, at its principal office in Worcester, Massachusetts, the sum of One Million One Hundred Twenty-Five Thousand ($1,125,000.00) Dollars, with interest thereon at the rate of ten (10%) percent per annum, in monthly installments of Twelve Thousand Ninety-Three and 75/100 ($12,093.75) Dollars, commencing January 1, 1970, said installments to be applied first upon interest and the balance upon principal, until December 1, 1984, when the entire principal balance shall mature and bear interest at the rate of eleven (11%) percent per annum. All delinquent installments and delinquent additional interest payments shall bear interest at the rate of eleven (11%) percent per annum from their respective dates of maturity.

The holder shall have the option without notice to declare the entire principal secured by this note to be immediately due and payable upon default in the payment of any installment, and the entire principal balance shall thereupon become due and payable and shall bear interest at the rate of eleven (11%) percent per annum. The failure of the holder to exercise said option upon any default shall not constitute a waiver of the right of the holder to exercise the same upon any subsequent default. The exercise of said option shall not be waived and the rights of the undersigned reinstated by payment or acceptance of delinquent installments or interest thereon. Said option shall continue in effect notwithstanding any reinstatement or extension and may be exercised from time to time thereafter upon the occurrence of subsequent defaults.

In addition to the monthly installments, as above provided, the undersigned promises to pay monthly to State Mutual Life Assurance Company of America as additional interest throughout the term of the loan an amount equal to 2% of the annual gross income received by the Mortgagor and/or its tenant in the operation of the property as a convalescent and nursing home. This amount shall be computed on the basis of the gross income received during the last previous month in accordance with monthly operating statements which shall be furnished by the Mortgagor. The aggregate annual amount paid under this provision shall be adjusted annually at the time the annual operating statement is submitted to State Mutual Life Assurance Company of America and any amount due under this provision shall be adjusted and paid at that time.

The undersigned shall have the privilege of paying the full amount of all indebtedness secured by this

note on January 1, 1982 or on any installment payment date thereafter; provided, that notice of intention to exercise said privilege be given in writing at least sixty (60) days prior to the date on which said payment is to be made; and provided further, that the undersigned pay to the holder a premium of 5% of the principal amount so paid if the loan is paid during the thirteenth year of the term of the loan; and a similar premium declining by ½ of 1% for each year thereafter.

This note is secured by real estate mortgage. The undersigned shall remain liable notwithstanding the discharge of said mortgage, a partial release of the mortgaged property or any agreement for extension or midification between the Mortgagee and subsequent owners of the mortgaged property or any part or interest therein.

Protest waived.

Service Investment Company, a
Michigan Corporation
By: /s/ Alex Seskin, President

ANSWER

(Filed July 6, 1971)

Defendant State Mutual Life Assurance Company of America, by its attorneys, Fischer, Franklin & Ford, answers the complaint in the above-entitled cause, as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations in paragraphs 1 through 5 of the complaint; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6, 7, 10 and 15 of the complaint; and denies each and every other allegation contained in the complaint.

Third Defense

Defendant alleges that Plaintiff on December 24, 1969, executed a certain Promissory Note, a copy of which is attached hereto and made a part hereof designated as Exhibit A, which among other things provided as follows:

> "The undersigned shall have the privilege of paying the full amount of all indebtedness secured by this note on January 1, 1982 or on any installment payment date thereafter; provided, that notice of intention to exercise said privilege be given in writing at least sixty (60) days prior to the date on which said payment is to be made; and provided further, that the undersigned pay to the holder a premium of 5% of the principal amount so paid if the loan is paid during the thirteenth year of the term of the loan; and a similar premium declining by ½ of 1% for each year thereafter."

Notwithstanding the fact that no prepayment privilege existed until January 1, 1983, and only then upon 60 days prior written notice, Defendant did agree and in fact did accept prepayment of the full balance owing upon the payment of the additional premium of 5% of the balance then owing.

Wherefore, Defendant State Mutual Life Assurance Company of America denies that Plaintiff is entitled to any relief in this case and prays that the Complaint be dismissed with costs.

Fischer, Franklin & Ford
By: /s/ John R. Mann
and
Paul L. Triemstra
Attorneys for Defendant
1700 Guardian Building
Detroit, Michigan 48226
962-5210

Dated: July 6, 1971

PLAINTIFF'S REPLY TO ANSWER

(Filed July 26, 1971)

First Defense

Plaintiff denies that the Complaint fails to state a claim in which no relief can be granted.

Second Defense

No Reply is required.

Third Defense

Reply to the Defendant's "Third Defense", Plaintiff states that the language taken from the note is not all of the language thereof, and that the note speaks for itself. Plaintiff attaches hereto a complete copy of said note.

Further Replying to this defense, Plaintiff denies that no prepayment privilege existed until January 1, 1983, denies that sixty (60) days notice was required, and denies that any premium was due. In support of its denial, Plaintiff will show that:

(a) By the Defendant's agreement to accept prepayments without penalty (the letter of January 25, 1971 attached to the Complaint), upon which Plaintiff acted and incurred expenses, Defendant agreed to, and did waive, the prepayment language of the note. Having been waived, that language gave the Defendant no right to exact a prepayment penalty.

(b) As a matter of construction, interpretation, trade and custom, and the dealings between the parties, time was not the esence of the agreed waiver. The Defendant's waiver of the prepayment provision of the note was understood and accepted by the practical interpretation of the parties to be a waiver where time was not of the essence.

(c) The payment exacted by the Defendant, after Plaintiff was committed to a new mortgage, is usurious and therefore unenforceable under the provisions of §450.78 Mich. Comp. Laws Ann. (General Corporation Act), and §438.31 (a)—§438.41 of Mich. Comp. Laws Ann. (Usury), in that the prepayment penalty which Defendant exacted was beyond the legal rate, Plaintiff had not agreed to it, and it was usurious. Plaintiff had, in no event, bound itself in writing to pay that amount or that penalty, and it is not enforceable against Plaintiff.

(d) The promissory note between the parties does not contain a time of payment provision which

would make said note payable "on or before a stated date or at a fixed time after a stated date" (§440.3109 Mich. Comp. Laws Ann.) and the note is ambiguous as to its time of payment. Said note is therefore a demand note (§ 440.3108 Mich. Comp. Laws Ann.), which Defendant, by its letter of January 25, 1971, had demanded, and, as to which, no prepayment penalty could be applied.

Wherefore, Plaintiff renews its prayer for Relief as stated in its Complaint.

Sugar, Schwartz, Silver, Schwartz & Tyler
By: /s/ David L. Nelson
Attorneys for Plaintiff
950 Guardian Building
Detroit, Michigan 48226
964-5300

Dated: July 26, 1971.

MOTION FOR SUMMARY JUDGMENT

(Filed December 6, 1971)

Now Comes Plaintiff, Service Investment Company, Inc., by and through its attorneys, Sugar, Schwartz, Silver, Schwartz & Tyler, and moving for Summary Judgment herein states as follows:

1. This Motion is made pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure.

2. Plaintiff believes that there is no material issue of fact and that there is no genuine issue as to any material

fact with respect to the matters set forth in the pleadings in this action and that Plaintiff is entitled to Summary Judgment as a matter of law.

3. This Motion is predicated upon the files and records in this cause, the depositions of Billie Smith and T. Waldo Thompson, the Affidavit of Jack Rosenzweig, attached to this Motion, the Affidavit of Bernard Mintz, attached to this Motion, and Plaintiff's Brief of Law also attached to this Motion.

Wherefore, Plaintiff respectfully moves that this Court enter a Judgment in its favor in the amount of Fifty-four Thousand Three Hundred Eighty-one Dollars and 69/100 ($54,381.69) together with interest thereon from February 8, 1971 to the date of payment thereof at the rate of 5% per annum as provided by Michigan Law. Plaintiff further prays that it be awarded its costs and attorney fees herein.

Sugar, Schwartz, Silver, Schwartz & Tyler
By: /s/ David L. Nelson
Attorneys for Plaintiff
950 Guardian Building
Detroit, Michigan 48226
964-5300

Dated: December 1, 1971.

AFFIDAVIT OF BERNARD MINTZ IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed December 6, 1971)

State of Michigan,
County of Wayne—ss.

Now Comes Bernard Mintz, and submits the following affidavit herein in support of Plaintiff's Motion for Summary Judgment and states upon oath as follows:

1. At all times relevant herein your affiant was and now is a certified public accountant with the firm of Kelman and Mintz, 16055 W. Twelve Mile Road, Southfield, Michigan, and he was employed in that capacity for Service Investment Company, Inc., hereinafter referred to as Service Investment, during the occurrence of the following events.

2. During July of 1970, Service Investment decided to seek refinancing for properties it owned in Warren, Michigan, on which there is located a nursing home, Abbey's Convalescent Nursing Home. At that time there was in existence a certain real estate mortgage dated December 24, 1969, in the original principal sum of $1,125,000.00 on which Service Investment was the mortgagor and State Mutual Life Assurance Company of America, hereinatfer referred to as State Mutual, was the mortgagee. A true copy of the original application submitted to State Mutual on or about August 12, 1969, is attached hereto as Exhibit "A". That application, page two, contained provision for a commitment fee including the provision:

> "If a commitment is issued by the lender to grant the loan on the terms herein specified or amended terms satisfatcory to applicant and the applicant re-

fuses or fails to accept the commitment in writing or close the loan under the terms provided in said commitment, the applicant will pay to the lender upon demand a fee equal to 2% of the amount of loan, less good faith deposit, as compensation for service rendered".

3. State Mutual granted the request of Service Investment by letter and agreed to accept pre-payment of the December 24, 1969 mortgage and loan "at par" up to September 30, 1970, this agreement was later continued by letters from State Mutual and Holmes-Harmon Corporation, dated October 23, 1970, November 2, 1970, January 19, 1971, January 25, 1971, February 5, 1971 and February 8, 1971. (Exhibits "B" through "I" attached). I do not have personal knowledge of all of these letters but I state on information and belief that they were given and sent as shown thereon.

4. Service Investment employed Mr. Jack Rosenzweig, a mortgage broker, to locate new financing. On December 14, 1970, a mortgage application was submitted to Detroit and Northern Savings and Loan Association by Service Investment to obtain a new mortgage for this property in the amount of $1,500,000.00.

5. On or about January 18 or 19 of 1971, affiant was informed by Detroit and Northern that the mortgage application was approved and that the Board of Directors of Detroit and Northern would meet on Monday, January 25, 1971, to take formal action. A closing date was set for Friday, January 29, 1971, to close the Detroit and Northern mortgage, and pay off the State Mutual mortgage. Affiant then (January 18 or 19, 1971) informed Holmes-Harmon of this approval and requested them to obtain payoff figures for January 29, 1971. Affiant spoke to Mr. William Husted of Holmes-Harmon at that time and

explained to him that it might happen that affiant or Mr. Sugar, attorney for Service Investment, would not be available to close or to deliver checks on January 29 if other business commitments prevented this. Mr. Husted stated that the payoff letter would contain a per diem interest rate which could be used if the actual closing occurred after January 29, 1971. The letter of Holmes-Harmon, dated January 25, 1971, setting forth the payoff figures, is attached as Exhibit "G". No pre-payment charge or bonus was contained in that letter, but it did contain a per diem rate if the closing occurred after January 29, 1971.

6. On Friday, January 22, 1971, affiant was informed by Detroit and Northern that a Mr. Novak, an engineer for the U.S. Internal Revenue Service had served a subpoena upon them concerning the personal income taxes of Alex Seskin, President of Service Investment. The subpoena involved the appraised value of the Warren premises and a certain written appraisal Detroit and Northern had obtained in conjunction with the mortgage application. As a result of Mr. Novak's action in serving this subpoena, the mortgage application was not given forml Board of Directors consideration by Detroit and Northern on January 25, 1971. There is no other reason known to me for postponement of the closing.

7. On January 26, 1971, affiant sent a letter to Detroit and Northern (Exhibit "K") explaining to them that the Internal Revenue activity was part of a routine audit and that it should not have any bearing on the remortgaging of the property. That matter was then resolved and Detroit and Northern took formal Board action on Monday, February 1, 1971, approving the mortgage application. A new date to close, Friday, February 5, 1971, was then established.

8. On February 4, 1971, the Detroit and Northern commitment letter was delivered and a check was delivered to Detroit and Northern by Service Investment in the sum of $15,000.00, to pay the required commitment fee. Exhibits "L" and "M".

9. Affiant did not learn that State Mutual demanded a 5% fee for the extension from February 1, 1971, to February 5, 1971 until the date of closing, February 5, 1971, when new payoff figures were delivered to Holmes-Harmon.

10. Service Investment was forced to pay the 5% penalty to close its new mortgage but it did so under protest (Exhibit "N") at the actual closing on February 8, 1971.

Further, deponent sayeth not.

/s/ Bernard Mintz

Subscribed and sworn to before me a Notary Public in and for said County and State, this 30th day of November, 1971.

/s/ David Kelman
Notary Public, Oakland County, Michigan
My commission expires October 23, 1973.

EXHIBIT B

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA

440 Lincoln Street, Worcester, Massachusetts 01605
(617) 798-8111

Our One Hundred Twenty-Fifth Year

Juy 28, 1970

Mr. T. W. Thompson
Executive Vice President
Holmes-Harmon Corporation
484 Pierce Street
Birmingham, Michigan 48011
Loan #8718
Service Investment Company

Dear Tommy:

During our telephone conversation yesterday, you informed me that our Borrower would like to refinance this loan with another source if he could repay in full at par.

You may inform the Borrower that in order to assist him in his attempts to refinance, we will accept payment in full at par. Our agreement to accept prepayment on this basis shall expire on September 30, 1970 at which time the existing terms of the Note shall apply.

Very truly yours,

/s/ Carl D. Valiton
Director of Mortgage Loans

CDV/mf

EXHIBIT C

August 7, 1970

Mr. Alex Seskin
Tek-Homes County Rd. #3
R. R.#, Box 13A
Elkhart, Indiana 46514
Re:Loan 8718—Service Investment Co.

Dear Alex:

Enclosed is a copy of a letter received from State Mutual Life Assurance Company regarding payment in full of the Service Investment Co. loan. You will note that they will accept payment in full, without any penalty, up to September 30th of this year.

Please keep us informed as to your progress in refinancing the mortgage.

Yours very truly,

T. W. Thompson

TWT/sd
enc.

EXHIBIT D

October 23, 1970

Service Investment Company
12250 Twelve Mile Road
Warren, Michigan 48093
Att: Mrs. Sirois
Re: Loan 8718—Service Investment Co.

Gentlemen:

We understand that you are making progress in the refinancing of the State Mutual Life Assurance Company mortgage covering the Abbey Convalescent Home and request a 60-day extension in order to consummate the matter.

We are, therefore, recommending to State Mutual that their agreement to accept prepayment of their loan at par be extended to December 31, 1970. We trust that during this period you will be able to complete your refinancing of the loan.

Yours very truly,

Holmes-Harmon Corporation
By .....

TWT/sd
cc/State Mutual

EXHIBIT E

STATE MUTUAL LIFE ASSURANCE COMPANY
OF AMERICA

440 Lincoln Street, Worcester, Massachusetts 01605
(617) 798-8111

November 2, 1970

Mr. T. W. Thompson
Holmes-Harmon Corporation
448 Pierce St.
Birmingham, Michigan 48011
Loan #8718—Service Investment Company

Dear Tommy:

I have your letter of October 23, enclosing a copy of the letter forwarded to the above Borrower.

We accept your recommendations concerning the extension of our agreement to accept prepayment in full at par until December 31, 1970.

Very truly yours,

/s/ Carl D. Valiton
Director of Real Estate

CDV/mf

EXHIBIT F

January 19, 1971

Mr. Carl D. Valiton
Director of Real Estate
State Mutual Life Assurance Co.
440 Lincoln Street
Worcester, Mass. 06105

Re: Loan #8718—Service Investment Co.

Dear Carl:

You will recall that your company agreed to accept payment in full of the above-captioned loan, with interest to date and at par, by December 31, 1970. Payment in full was not made by that date. However, we were informed by the attorney for the mortgagor that an application and other documents were in process to re-finance your loan. We are now informed by the accountant for the mortgagor, Mr. Bernard Mintz, that the Detroit and Northern Michigan Building and Loan Association has issued a commitment for $1,500,000.00 and a closing is set for January 29, 1971.

Will you please inform us if your company is still willing to accept payment in full at par and, if so, will you please have Mr. William Welcker furnish us with pay-off figures?

Sincerely yours

Holmes-Harmon Corporation
T. W. Thompson
Executive Vice-President

TWT:ef

EXHIBIT G

HOLMES/HARMON CORPORATION

Detroit/Washington, D.C.

January 25, 1971

Mr. Bernard Mintz
16055 W. Twelve Mile Rd.
Southfield, Mich. 48075

Re: Loan #8718—Service Investment Co.

Dear Mr. Mintz:

This will confirm our telephone conversation today with regard to State Mutual's agreement to accept prepayment in full of the above loan at par provided payment in full is made by February 1, 1971.

The following reflects the amount necessary to pay this loan in full on January 29, 1971:

Principal Balance based on our receipt of 7/1/71 payment	$1,087,833.87
Interest @ 10% from 1/1/71 to 1/29/71 (28 days)	$ 8,461.04
Recording discharge of mortgages..	$ 4.00
	$1,096,298.91

Per Diem interest $302.18 from 1/29/71 to actual date of payment in full.

There is a balance in the tax escrow account in the amount of $12,070.92 and this will be refunded along with the canceled mortgage documents.

Yours very truly,

Holmes-Harmon Corporation
/s/ William H. Husted

WHH:ef
cc:
Service Investment Co.
12250 E. Twelve Mile
Warren, Mich. 48093

EXHIBIT H

HOLMES/HARMON CORPORATION

Detroit/Washington, D.C.

February 5, 1971

Service Investment Company
12250 E. Twelve Mile Road
Warren, Michigan 48093

Re: Loan No. 8718

Gentlemen:

This is to inform you that the State Mutual Life Assurance Company of America has authorized us to accept payment in full of the above-captioned loan, provided said payment in full is received not later than February 8, 1971, upon the following basis:

Principal Balance		$1,087,833.87
Interest at 10% from January 1, 1971 to February 5, 1971	$	10,274.00
2% of Gross Income of $260,000.00..	$	5,200.00
Prepayment Premium	$	54,391.69
Recording Discharge of Mortgages	$	4.00
		$1,157,703.56

If we do not receive payment until February 8, 1971, there will be an additional three days interest amounting to $906.54.

The signed statement by Service Investment Company certifying rental income received for the period of the loan shall be required.

There is a balance in the tax escrow account in the amount of $12,070.83 and this will be refunded along with the cancelled mortgage documents.

Yours very truly,

Holmes-Harmon Corporation
/s/ William H. Husted

WHH:ef

EXHIBIT I

HOLMES/HARMON CORPORATION

Detroit/Washington, D.C.

February 8, 1971

Service Investment Company
12250 E. Twelve Mile Rd.
Warren, Michigan 48093

Re: Loan #8718

Gentlemen:

This will refer to our letter dated February 5, 1971, which contemplated payment in full of the above-captioned loan to be received in our office not later than February 8, 1971. State Mutual has extended this time limit to not later than February 10, 1971.

If payment is received in our office today, the total amount due will be $1,158,610.10, which will include interest to February 8, 1971. If payment is received in our office on Tuesday, February 9, 1971, an additional day's interest of $302.18 or $1,158.912.28 will be required, which will pay interest through February 8, 1971.

Yours very truly,

Holmes-Harmon Corporation
/s/ William H. Husted

WHH:ef

AFFIDAVIT OF JACK ROSENZWEIG IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed December 6, 1871)

State of Michigan
County of Wayne—ss:

Jack Rosenzweig, after first being sworn, deposes and says that he was a General Partner of Inland Seas Trading Company, a Limited Michigan Co-Partnership, the mortgage broker for Service Investment Company in connection with negotiation of a certain real estate mortgage in the sum of $1,500,000.00 on which Detroit and Northern Savings and Loan Association was mortgagee which was closed on February 8, 1971, and he does further state as follows:

1. Affiant's company was employed by Service Investment to negotiate and obtain a real estate mortgage and loan in the sum of $1,500,000.00 in the late summer or early fall of 1970. The security was to be the land and premises occupied by Abbey Convalescent & Nursing Home, in the City of Warren, Michigan, which was leased to said nursing home by Service Investment. Inland Seas Trading Company was to be compensated in an amount equal to 2% ($30,000.00) of the new mortgage commitment. This understanding was later set out in a letter of authority given to affiant by Service Investment which is attached hereto as Exhibit "A".

2. Affiant's firm did undertake to obtain the new mortgage. After several conversations with Mr. Martino, President of Detroit and Northern Savings and Loan Association, affiant became encouraged that such a new mortgage might be obtained on agreeable terms. Affiant discussed

the matter further with Mr. John Seibel, an officer of Detroit and Northern, and when it became apparent that the transaction was feasible, these discussions led to the submission of a mortgage application to Detroit and Northern on or about December 14, 1970. Throughout these discussions and the submission of the application it was understood that the then existing mortgage could be paid off at par.

3. Affiant continued to work on the matter into January of 1971, collecting necessary documents from Service Investment and communicating with Detroit and Northern to process the application. Affiant was informed by Detroit and Northern on or about January 18, 1971, that the mortgage application would be approved. A closing date was set for January 29, 1971.

4. Affiant later learned, some time near January 22, 1971, that the closing date had been postponed because a certain Mr. Novak of the Internal Revenue Service had made calls upon persons in the Detroit and Northern in connection with Mr. Alex Seskin of Service Investment.

Affiant did not know the details of the investigation but learned during the following week that Detroit and Northern was satisfied that this occurrence would not alter the making of the loan. A new closing date was set for February 5, 1971. The only reason known to affiant for not completing the closing on January 29th, was the untimely appearance of Mr. Novak and the need to satisfy Detroit and Northern that the investigation should not affect the making of the loan.

5. On February 4, 1971, Affiant was informed that State Mutual, which then held the first mortgage, wanted to see the commitment letter from Detroit and Northern. To do that, it was necessary that Service Investment pay a non-refundable commitment fee ($15,000.00); which was done on February 4, 1971. Affiant then picked up the new

commitment letter and hand-delivered it to Mr. Waldo Thompson at Holmes-Harmon Company on February 4, 1971. Mr. William Husted of Holmes-Harmon, was also present when the letter was delivered. Mr. Thompson phoned the home office of State Mutual in my presence. From that portion of the conversation that affiant heard, it sounded as though State Mutual was considering a penalty. Mr. Thompson told me to return to the Holmes-Harmon offices on February 5, 1971, to pick up the payoff letter. Affiant did that and observed that the payoff letter (which was dated February 5, 1971) contained a penalty in the approximate sum of $54,000.00. When affiant informed Mr. Seskin of Service Investment of this development, he refused to close on February 5, 1971. Arrangements were then made with the escrow agent to pay the penalty, but under protest, in order to avoid losing the new mortgage, and all of the expenses and effort that had been incurred. The closing took place on February 8, 1971, and I delivered two (2) checks to Holmes-Harmon, each payable to State Mutual, one for $1,104,520.50 and one for $54,391.69. The latter check bore the legend "paid under protest".

6. Under Inland Seas Trading Company's Agreement the company earned its commission when the Detroit and Northern commitment was delivered. The Company was paid on February 8, 1971, by check in the amount of $20,000.00 and the Company took a promissory note for $10,000.00 to cover the balance of our fee. Under said agreement the fee was $30,000.00 because a 2% premium was paid to Detroit and Northern to obtain the loan.

7. The transaction was definitely intended to close on January 29, 1971, and the only reason it did not, known to me, was the appearance of Mr. Novak of the Internal Revenue Service.

8. A copy of the original Mortgage Application is attached as Exhibit B.

Further, deponent sayeth not.

/s/ Jack Rosenzweig

Subscribed and sworn to before me this 6th day of September, 1971.

/s/ Linda S. Krall
Notary Public, Wayne County, Michigan
My Commission Expires March 12, 1974

Exhibit "A"

LETTER FROM ALEXANDER SESKIN TO INLAND SEAS TRADING COMPANY
(Filed December 6, 1971)

November 30, 1970

Inland Seas Trading Company
21675 Coolidge
Oak Park, Michigan

Re: Service Investments Company, Alexander Seskin, President, Abbey Convalescent and Nursing Home

Dear Mr. Joseph:

This letter is to confirm your authorization to secure a permanent loan commitment on the captioned property in the amount of $1,500,000.00 This authorization will expire in 30 days from the date of your receipt of all required documents. During this time, the undersigned or any of its affiliates will not attempt to secure such commitment with any other lender, broker or source. Said loan to be amortized over 20 years bearing interest rate of no

more than 10% percent. The borrower shall not be required to guarantee more than the top 10 percent of the loan. There shall be no participation by the lender in the gross revenues of the Abbey Convalescent and Nursing Home.

The undersigned hereby agrees to pay to Inland Seas Trading Company, including its agents and lenders, a fee of $60,000.00, upon presentation of commitments, as outlined above. If any deposit is required by the lender, said deposit shall be paid forthwith and shall be credited toward the herein mentioned fee. However, in the event a commitment is not obtained as outlined above, said deposit will be returned immediately. Balance of fee shall be paid forthwith upon date of initial draw.

Very truly yours,

By: /s/ Alexander Seskin, President

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed December 28, 1971)

Now comes Defendant, State Mutual Life Assurance Company of America, by and through its attorneys, Fischer, Franklin & Ford, and moving for Summary Judgment herein states as follows:

1. This Motion is made pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure.

2. Defendant believes that there is no genuine issue as to any material fact in this action and that Deefndant is entitled to a judgment as a matter of law, as appears from the pleadings and depositions on file in this action, and the affidavit of T. Waldo Thompson attached hereto and made a part hereof.

Wherefore, Defendant respectfully moves that this Court enter a Judgment in its favor dismissing the action. Plaintiff further prays that it be awarded its costs and attorney fees.

Fischer, Franklin & Ford
By: /s/ John R. Mann
Attorneys for Defendant
1700 Guardian Building
Detroit, Michigan 48226
962-5210

Dated: December 15, 1971.

AFFIDAVIT OF T. WALDO THOMPSON IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed December 28, 1971)

State of Michigan
County of Wayne—ss.

T. Waldo Thompson, being first duly sworn deposes and says:

1. He is the Secretary of Holmes/Harmon Corporation which is the mortgage loan correspondent of the defendant in the above-entitled action.

2. He was active in this transaction during the entire period that the loan was in existence and also during the time when Service Investment Company requested to prepay the loan.

3. There was an agreement to accept prepayment of the loan at par which was to expire September 30, 1970. There were also subsequent extensions to allow prepayment with each extension specifically stating that payment

must be made by a certain date. These expiration dates were September 30, 1970, then December 31, 1970 and February 1, 1971.

4. The final extension to February 1, 1971 was based upon a letter from Helen J. Siplas of State Mutual Life Assurance Company of America dated January 22, 1971 which is attached hereto as Exhibit A. A portion of that letter reads " . . . we will accept prepayment in full of the above loan at par, provided payment in full is made by February 1, 1971".

5. A letter was sent from our office to Mr. Bernard Mintz dated January 25, 1971 which indicated the amount needed to prepay the loan on January 29, 1971, a copy of which is attached hereto as Exhibit B. It was expressly stated that State Mutual's acceptance "at par" was predicated upon receiving payment in full by February 1, 1971.

> "This will confirm our telephone conversation today with regard to State Mutual's agreement to accept prepayment in full of the above loan at par provided payment in full is made by February 1, 1971."

6. When Holmes/Harmon Corporation learned that the closing was not going to take place by February 1, 1971, another letter was sent dated January 28, 1971, to Bernard Mintz revoking the payoff letter of January 25, 1971, a copy of which is attached hereto as Exhibit C.

/s/ T. Waldo Thompson

Subscribed and sworn to before me this 27th day of December, 1971.

Selma E. Deidrich
Notary Public, Wayne County, Michigan
My commission expires: March 31, 1974
Acting in Oakland County

Exhibit A

LETTER FROM HELEN J. SIPLAS TO T. W. THOMPSON

(Filed December 28, 1971)

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA

440 Lincoln Street, Worcester, Masachusetts 01605
(617) 798-8111

Our One Hundred Twenty-Fifth Year

January 22, 1971

Mr. T. W. Thompson
Executive Vice President
Holmes/Harmon Corporation
484 Pierce Street
Birmingham, Michigan 48011

Loan #8718—Service Investment Co.

Dear Mr. Thompson:

Confirming our telephone conversation today regarding your letter of January 19, 1971, we will accept prepayment in full of the above loan at par, provided payment in full is made by February 1, 1971.

Since your office has received the January 1, 1971 payment, we have calculated the amount necessary to pay this loan in full on January 29, 1971 as follows:

Principal Balance based on your receipt of 1/1/71 payment	$1,087,833.87
Interest @ 10% from 1/1/71 to 1/29/71 (28 days)	8,461.04
Total.....	$1,096,294.91
**Recording discharge of Mtgs.....*	*4.00*
	$1,096,298.91

Per Diem interest $302.18 from 1/29/71 to actual date of payment in full.

Thank you for your attention to this matter.

Very truly yours,

/s/Helen J. Siplas
(Mrs.) Helen J. Siplas,
Assistant Manager

* Editor's note: portion in italics handwritten.

Exhibit C

LETTER FROM MR. HUSTED TO MR. MINTZ

(Filed December 28, 1971)

January 28, 1971

Mr. Bernard Mintz
16055 W. Twelve Mile Rd.
Southfield, Mich. 48075

Re: Loan #8718—Service Investment Co.

Dear Mr. Mintz:

This is in reference to our letter of January 25, 1971, concerning the above loan which is to be paid in full.

We have been notified that the closing has been changed from January 29 to February 5, 1971. In view of this, we must revoke our letter of January 25, 1971, as it was predicated on payment being made in full by February 1, 1971.

We have requested a revised pay-off letter from State Mutual and you will be advised as soon as we hear from them.

Yours very truly,

Holmes-Harmon Corporation
William H. Husted

WHH:ef
cc.
Service Investment Co.
12250 E. Twelve Mile
Warren, Mich 48093

MEMORANDUM AND ORDER

(Filed January 21, 1972)

This case is properly before the court on joint motions of plaintiff, Service Investment Company, Inc., a Michigan Corporation, and defendant, State Mutual Life Assurance Company of America, a Foreign Corporation, for summary judgment pursuant to Rule 56, F.R.C.P.

Both parties have filed exhibits and carefully delineated the relevant facts and oral arguments have been heard by the court. There is no need for purposes of this memorandum to detail the entire series of correspondence between plaintiff, defendant and defendant's agent, Holmes-Harmon, a mortgage broker. The pleadings show that Service Investment executed a promisory note in the principal sum of One Million One Hundred Twenty-five Thousand and 00/100 ($1,125,000.00) Dollars payable to defendant State Mutual.[1] This note was secured by a first real estate mortgage, on certain land and buildings in the city of Warren, Michigan.

Thereafter plaintiff sought to prepay the note at par in order to obtain new, and more favorable, financing of the mortgage. Correspondence between the parties from July 1970 to January 1971 indicates that defendant was willing to accept prepayment at par, with the stipulation that pay-

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[1] With respect to interest the note provided as follows:

. . . with interest thereon at the rate of 10 per cent (10%) per annum in monthly installments of Twelve Thousand Ninety-Three and 75/100 ($12,093.75) Dollars, commencing January 1, 1970, said installments to be applied first upon interest and the balance upon principal, until December 1, 1984, when the entire principal balance shall mature and bear interest at the rate of 11 per cent (11%) per annum.

ment be made at whatever date was specified in the letter. The last date agreed upon for the acceptance of payment at par was February 1, 1971. On February 5, 1971, payment not being forthcoming on February 1, 1971, defendant, through its agent, sent a letter setting forth new terms upon which payment in full would be accepted. It is at this juncture that plaintiff's complaint arises. The new element in the payoff figures included a heretofore novel provision requiring a "pre-payment premium" in the sum of Fifty Four Thousand Three Hundred Eighty-one and 69/100 ($54,381.69) Dollars. Plaintiff argues that this prepayment premium is a usurious penality charge in excess of the legal limit.[2]

Prior to this letter of February 5, 1971, plaintiff was engaged in negotiations with Detroit and Northern to obtain refinancing of the mortgage and incurred considerable expense during these proceedings. Defendant was apprised of plaintiff's efforts in this regard at all times and was aware of delays in setting a closing date for the mortgage. The closing finally occurred on February 8, 1971, after receipt of the February 5 letter. At this time the atttorney for plaintiff had two separate checks prepared from the new mortgage proceeds; one check in the amount of Fifty Four Thousand Three Hundred Eighty-one and 69/100

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[2] The Note provided as follows:

> The undersigned shall have the privilege of paying the full amount of all indebtedness secured by this note on January 1, 1982, or on any installment payment date thereafter; provided, that notice of intention to exercise said privilege be given in writing at least sixty (60) days prior to the date on which said payment is to be made; and provided further that the undersigned pay to the holder a premium of 5 per cent (5%) of the principal amount so paid if the loan is paid during the thirteenth year of the term of the loan; and a siimlar premium declining by one-half (½) of 1 per cent (1%) for each year thereafter.

($54,381.69) Dollars bearing the legend "paid under protest" and the other for One Million One Hundred Four Thousand Five Hundred Twenty and 01/100 ($1,104,520.00) Dollars. Then, on February 8, 1971, defendant delivered another letter to Service Investment referring to its letter of February 5, 1971 stating "State Mutual has extended this time limit to not later than February 10, 1971.

Plaintiff argues that the prepayment penalty constitutes usury under the laws of Michigan because defendant knew that plaintiff had committed itself to seeking refinancing of the mortgage and incurred considerable expense in so doing. This reliance is said to have created a situation where plaintiff was forced to make the prepayment, including the bonus, involuntarily. It is contended that the penalty charge was for the seven day delay in closing from February 1 to February 8 thus exceeding any permissible statutory rate.

This court is of the opinion that plaintiff has not shown that the bonus payment extracted by defendant supports a charge of usury. The prepayment of the loan was voluntarily sought by plaintiff; defendant could not have required plaintiff to pay the balance of the note prior to the maturity date specified in the agreement.

It is well settled that where a lender requires a payment of a bonus or a penalty prior to maturity, it is not usurious. The penalty or bonus is not considered interest on the loan but rather as payment for release of a party's obligations under a contract. 75 A.L.R. 2d 1267 states:

> (a) prepayment premium required by the lender as condition for accepting the borrower's proposed termination of the loan before its maturity, the contract making no provision for such contingency, was held in

> *Atlantic City Life Insurance Company v. Wolf* (1947, Mun. Ct. App. Dist. Col.) 54A 2d 641, not to be interest. It was said that the transaction was the very reverse of a loan, putting an end to credit instead of giving it, and that it was not tainted with usury.

See also, *Feldman v. Kings Highway Savings Bank*, (1951) 278 App. Div. 589, 102 Ny 2d 306 aff'd. 303 Ny 675, 102 N.E. 2d 835.

In the instant case a prepayment privilege existed but was of no effect until January 1, 1982. Impliedly, this 5% prepayment penalty accrued to defendant if prepayment were tendered and accepted before the date of January 1, 1982. *French v. Mortgage Guarantee Company* (Cal. 1940), 104 P 2d 655, 130 ALR 67, considered such a situation. The court held that where a lender permitted a borrower to repay a loan in advance of the effective date of a prepayment option, it was not usurious:

> . . . a debtor cannot by his voluntary act render a transaction usurious, which, but for such circumstance, would be entirely free from a claim of usury.

Thus it seems to this court that under either the view that the prepayment merely terminates the contract, or the view that the amount paid is far below the contracted amount, the plaintiff cannot sustain a charge of usury under the facts in this case.

Under the former view the plaintiff has been excused from the obligations of the loan agreement pursuant to his voluntary desire to prepay at par. Under the latter view plaintiff is paying for less than the interest rate contracted for in the note. It is this court's view that simply because defendant determined that it would exercise its rights to demand a prepayment penalty for payment of the loan

before maturity, no inference of usury can be drawn therefrom. 75 A.L.R. 2d 1265 states:

> . . . "The voluntary repayment of a loan before its maturity does not render a loan transaction usurious which would have been free of usury if the payment had been made at the stipulated maturity date, although by reason of such payment the interest paid to the lender exceeds the lawful interest computed to the date when the loan was paid, so long as the total interest computed to the maturity date does not exceed the legal rate."

While defendant waived its right to receive interest to the date of maturity by agreeing to accept prepayment at par, it should not be considered to have waived its right to the 5% prepayment penalty to which it was entitled in 1982. Although the extraction of the penalty may seem harsh to plaintiff in light of defendant's previous spirit of cooperation,[3] this court cannot find a basis in law to sustain a charge of usury.

Therefore, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

Damon J. Keith,
U.S. District Judge.

Dated: January 19, 1972.

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[3] The court also finds that "time was of the essence" in defendant's agreement to accept prepayment at par in light of the requirement in each letter granting an extension that payment be received by a particular date. See *Grade v. Loafman*, 314 Mich 364 (1946) holding, *inter alia*, that an express provision is not necessary in order to make time of the essence of the contract.

PLAINTIFF'S MOTION FOR REHEARING

(Filed February 9, 1972)

Now comes Plaintiff moving under Rule IX-A of the Rules for the Eastern District of Michigan for a rehearing and respectfully states to this Honorable Court that the Opinion and Order of the Court filed January 21, 1972, granting Summary Judgment to Defendant and against Plaintiff is defective within the meaning of the stated Rule because it erroneously concludes numerous fact issues and fact inferences against the Plaintiff contrary to Rule 56 c F.R.C.P. More particularly Plaintiff states as follows:

1. That it appears to Plaintiff that the Court has erred in deciding fact issues against Plaintiff on Defendant's Motion for Summary Judgment.

2. That it appears to Plaintiff that the Court has erred in not according to Plaintiff the benefit of all inferences which can be drawn from the facts.

3. That the Court has decided issues of fact instead of determining whether or not fact issues exist.

4. The Court's opinion deprives Plaintiff of Trial by Jury on issues of fact.

5. The Court has erred in not applying several rules of contract interpretation delineated in Plaintiff's Brief attached.

6. The Court has determined as a fact that the penalty was made for a general privilege of prepayment unrestricted in time when in fact Plaintiff claims, and brought before the Court evidence to show, it was made and intended to be made for an eight-day period only, and that as such it was usurious.

7. The Court determined as a fact that time was of the essence when this was denied by Plaintiff and was at least an issue of fact requiring a finding of the intent of the parties from the document, from surrounding circumstances, from rules of interpretation, and which required a determination of fact that the letters of Defendant were not ambiguous. Such finding is further contrary to an undenied per diem rate in the agreeement which Plaintiff requested in case of delay, also undenied.

8. The Court's opinion finds as a fact or can be construed to find as a fact that the surrounding circumstances evidence an intent to make time of the essence, since Plaintiff raised the issue of surrounding circumstances. In fact, circumstances indicate to the contrary, but at least an issue of fact existed.

9. The Court's opinion concludes fact issues involving waiver, reasonable reliance, and good faith.

10. The Court adopts a construction favoring a forfeiture which could only be sustained by a finding of fact that the parties clearly so intended.

11. The Court found as a fact that Plaintiff paid the penalty voluntarily when, in fact, Plaintiff paid it under protest, and under economic duress. Again, at least a fact issue was raised.

12. The Court found as a fact that the letters were "with the stipulation" that payment be made by a specified date when the records show frequent waiver of dates, contrary interpretation by both party's conduct and words, reliance by Plaintiff on an opposite interpretation, a specific request for a per diem rate, and lack of any notice from Defendant insisting on forfeiture.

Plaintiff submits that under applicable law the Court has failed to determine if fact issues exist but has instead

decided fact issues against the Plaintiff contrary to Rule 56. Plaintiff, therefore, prays as follows:

1. That the Court grant Rehearing of Defendant's Motion for Summary Judgment, set a time therefor and notify counsel of date of Rehearing.

2. That the Court rule on this Motion as soon as possible and not later than necessary to permit Plaintiff to file and appeal within the appeal period.

Sugar, Schwartz, Silver, Schwartz & Tyler
By: /s/ David L. Nelson, Esq.
Attorneys for Plaintiff
1832 Buhl Building
Detroit, Michigan 48226
964-5300

Dated: February 8, 1972

ORDER DENYING MOTION FOR REHEARING

(Filed February 17, 1972)

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 16th day of February, A.D. 1972.

Present: Honorable Damon J. Keith, District Court Judge.

Plaintiff in the above-captioned cause has filed a motion for rehearing;

Upon consideration of plaintiff's pleadings and the Court's Memorandum and Order entered in this cause on January 19, 1972, the motion is hereby denied.

Damon J. Keith,
District Judge

ORDER AFFIRMING JUDGMENT

(U. S. District Court of Appeals—Sixth Circuit)

(Filed October 18, 1972)

Before Weick, McCree and Kent, Circuit Judges.

Upon consideration, it is ordered that the judgment of the District Court be and it is hereby affirmed on the opinion of District Judge Damon J. Keith.

Entered by order of the Court.

/s/ James A. Higgins,
Clerk.

ORDER DENYING PETITION FOR REHEARING

(U. S. Court of Appeals—Sixth Circuit)

(Filed December 12, 1972)

Before Weick, McCree and Kent, Circuit Judges.

Upon consideration, it is ordered that the petition for rehearing be denied.

Entered by order of the Court.

/s/ James A. Higgins,
Clerk.

AUTHORITIES CITED

Cases: Page

Atlantic Life Ins. Co. v Wolf (Mun Ct App Dist Col) 54 A2d 641 (1947) 6

Dick v New York Life Ins. Co., 359 US 437, 3 L Ed2d 935, 79 S Ct 921 (1959) 2

Feldman v Kings Highway Sav. Bank, 278 App Div 589, 102 NYS2d 306, affd 303 NY 675, 102 NE2d 835 (1951) 6

Magnum Import Co. v Coty, 262 US 159, 67 L Ed 922, 43 S Ct 531 (1922) 3

Reich v Pine Lawn Bank & Trust Co. (Mo App) 356 SW2d 545 (1962) 7

Smith v Reinauer Oil Transport, Inc. (CA 1 Mass) 256 F2d 646 (1958) 3

Smithwick v Whitley, 152 NC 366, 67 SE 914 (1910) 7

United States v Johnson, 268 US 220, 69 L Ed 925, 45 S Ct 496 (1924) 3

Other:

75 ALR2d 1265 (1961) Usury as Affected by Repayment or Borrower's Option to Prepay Loan Before Maturity 6

45 Am Jur 2d 147, Interest and Usury, §184, note 8 7

Work of the Federal Courts by Hon. Fred M. Vinson, 69 S Ct v, vi (1949) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1237

SERVICE INVESTMENT CO., INC.,
Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Service Investment Co., Inc. has petitioned for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on November 18, 1972.

The Respondent, State Mutual Life Assurance Company of America, prays that the Petition for a Writ of Certiorari be denied and submits the following in opposition to said petition:

ARGUMENT

I.

Petitioner has asserted no reasons for granting the Writ of Certiorari which fall within one of the traditional classes set forth in Supreme Court Rule 19.

(a) There is no showing that there is a conflict with any other Circuit Court of Appeals;

(b) There is no showing that the question presented is sufficiently important or novel for the Supreme Court to review;

(c) There is no showing that the lower court has departed so far from the usual course of judicial proceedings that the decision calls for an exercise of the Supreme Court's supervisory powers.

In addition, there is no constitutional issue involved in this case which warrants review by certiorari. Petitioner claims it was denied the right to have a jury determine certain factual issues, which right was denied by the granting of Respondent's Motion for Summary Judgment. At the outset, it should be noted that Petitioner also moved for a Summary Judgment contending that there were no factual issues. But even if we assume there conceivably were some fact issues, this alone is not enough to warrant certiorari. The right to have material factual questions determined by a jury is a well settled proposition. It is not an issue which is novel, unsettled or important enough to warrant further consideration. The trial judge and the Court of Appeals found there were no such issues. As in *Dick* v *New York Life Ins. Co.*, 359 US 437, 3 L Ed 2d 935, 79 S Ct 921 (1959), where the petition for certiorari sets forth the question whether Petitioner was de-

prived of her constitutional right to a jury trial guaranteed by the Seventh Amendment, Justice Frankfurter, in a separate opinion, attempted to delineate the policy of the Supreme Court at page 947 by quoting from *Smith* v *Reinauer Oil Transport, Inc.* (CA 1 Mass) 256 F 2d 646 (1958) as follows:

> "If an appellate court is of the view that the trial court made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal [by a Court of Appeals] is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment."

The question raised by Petitioner as to whether there were material questions of fact present in this case would demand that the Supreme Court look at the facts to determine their materiality. This is not a proper question for review by the Supreme Court. It traditionally has been the policy of the Supreme Court to deny certiorari when review is sought solely upon an analysis of the particular facts involved. In *United States* v *Johnson,* 268 US 220, 69 L Ed 925, 45 S Ct 496 (1924), the court said at page 926:

> "We do not grant a certiorari to review evidence and discuss specific facts."

It has been reiterated numerous times that a writ of certiorari will not issue merely to accord another hearing to the party defeated in the court of appeals. In a typical case in which this proposition is stated, *Magnum Import Co.* v *Coty,* 262 US 159, 67 L Ed 922, 43 S Ct 531 (1922), the Court has set forth the basic principles to be considered when reviewing a petition for certiorari at page 924 as follows:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The only contention of Petitioner is that the lower courts (both District and Court of Appeals) made an error in granting and upholding Respondent's Motion for Summary Judgment. It has been repeatedly held by this court that alleged error alone is not enough to assure certiorari. The Supreme Court is not primarily concerned with the correction of errors in lower court decisions as was stated by former Chief Justice Vinson in an address before the American Bar Association on September 7, 1949 entitled "Work of the Federal Courts" as reported at 69 S Ct, pages v, vi:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Jdgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have

> arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

Furthermore, there is no error in either of the lower courts decisions in this case.

II.

The decision of the lower court in this case is clearly correct and thus does not require review. The issue presented was very simple: Did the Respondent's demand for a prepayment premium after the time within which any waiver of premium had expired constitute usury? The Respondent, the Federal District Court and the Circuit Court of Appeals all agreed that this did not constitute usury as a matter of law. At no time was Petitioner required to prepay the loan which is the subject matter of the controversy in this case. As a matter of law, it is elementary that the payment of such a premium could not be considered usurious whether the amount was considered in the calculation of interest or whether the amount is not interest and merely terminates the loan contract.

It is well settled that where a lender requires the payment of a bonus or premium for payment prior to maturity, it is not interest. Numerous cases have held that

the money paid as a penalty or bonus for prepayment of a loan before maturity was not paid as interest on the loan but to secure the release of the contract. In a leading comment in 75 ALR2d 1265 (1961) the validity of this decision is stated at page 1267:

> "A prepayment premium required by the lender as condition for accepting the borrower's proposed termination of the loan before its maturity, the contract making no provision for such contingency, was held in *Atlantic Life Ins Co* v *Wolf* (1947), (Mun Ct App Dist Col) 54 A2d 641, not to be interest: It was said that the transaction was the very reverse of a loan, putting an end to credit instead of giving it, and that it was not tainted with usury.
>
> A 'prepayment privilege charge' required by the defendant bank from the plaintiff borrower who wanted to terminate his indebtedness 4 years before the earliest possible time provided therefor in the loan contract did not constitute usury, said the court in *Feldman* v *Kings Highway Sav. Bank* (1951) 278 App Div 589, 102 NYS2d 306, affd 303 NY 675, 102 NE2d 835, since such charge was neither required nor given in consideration of the making of the loan or of forbearance of money, but, on the contrary, for the making of a new and separate agreement, the termination of the indebtedness, and was accordingly not a payment of interest which might provide the basis for a claim of usury."

It is clear that since a bonus or prepayment penalty is not exerted for the use of money, rather to determine a debt, it is not interest.

As a general rule, absent a prepayment privilege, there is no right of prepayment of a note with interest to the date of payment prior to maturity. In fact, it is generally held that where repayment of a loan is made before maturity, the lender may receive interest to the stipulated maturity date without making itself guilty of usury.

We call your attention to an additional comment in 45 Am Jur 2d 147, Interest and Usury, §184, note 8, where it is stated:

> "Where there is no optional prepayment clause in a note, it is not usurious for a lender to require the payment of interest, or a part thereof, to the date of the maturity of the note, even though the debt is paid before maturity and the amount paid exceeds lawful interest computed to the date when the loan was paid. *Reich* v *Pine Lawn Bank & Trust Co* (Mo App) 356 SW2d 545.
>
> In *Smithwick* v *Whitley,* 152 NC 366, 67 SE 914, where a borrower sought to pay a series of notes secured by a mortgage some years before the maturity dates of several of such notes, and the lender refused to accept payment of the notes not due unless the borrower paid interest in full to the maturity of each note, which amount the borrower thereupon paid, and then sued the lender for usury on taking such 'unearned interest,' it was held that the lender had not taken usury."

The general rule for testing the validity of a prepayment premium is set forth at 75 ALR2d 1268 (1961) as follows:

> "If, pursuant to a prepayment option in a loan contract, a loan is voluntarily paid before its maturity, the contract will not be rendered usurious in a case in which the total interest received by the lender is not in excess of the interest computed at the maximum lawful rate from the time the loan began to the absolute maturity specified in the contract."

Despite Petitioner's contention that the Court erred in determining certain questions of fact, both the District Court (on motion for rehearing) and the Appellate Court (on appeal and on motion for rehearing), after lengthy

arguments and careful review, determined that Petitioner failed to present any genuine issue of fact which would require the court to reverse its decision.

Accordingly, and for the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD FORD
JOHN R. MANN
PAUL L. TRIEMSTRA
FISCHER, FRANKLIN & FORD
Attorneys for Respondent
1700 Guardian Building
Detroit, Michigan 48226

April 9, 1973